No. 91-610

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Petitioners submit this reply in support of our Petition for a Writ of Certiorari ("Petition"). We demonstrated in our Petition that the questions presented are substantial and important. We demonstrated that the opinion of the Court of Appeals cannot be reconciled with express provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and the policies underlying that legislation, and that it threatens to undermine the multiemployer segment of the private pension system in the United States. The troubling implications and precedential impact of the Second Circuit's opinion are underscored and analyzed by two briefs *amicus curiae* filed in support of the Petition.[1] The basic thrust of the Respondents' brief in oppo-

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[1] Motion for Leave to File Brief *Amicus Curiae* and Brief of *Amicus Curiae* Central States, Southeast and Southwest Areas Pen-

sition ("Opp. Br.") is to attempt, through misleading statements of the case, to minimize the impact that the Second Circuit's erroneous legal and policy positions will have on employee benefit plans governed by ERISA.

1. Respondents begin by asserting that the issue addressed by the Second Circuit was whether "surplus" reserves or assets must be transferred from one multiemployer benefit plan to another. (Opp. Br. at 1, 4, 8). "Surplus" reserves or assets have not been the subject of the present case in either the Court of Appeals or the District Court. Neither of those courts rendered their decisions with reference to any "surplus." Indeed, the term "surplus" does not even appear in the opinions of either of those courts.

The issue addressed by the Court of Appeals and the District Court is whether assets or reserves of one multiemployer benefit plan are required by law to be transferred from one multiemployer benefit plan to another (Petition at 2a (Court of Appeals), 13a (District Court)). Respondents did not limit their claim to assets that were "surplus." The claim of the Respondents and the holding of the Court of Appeals measure the claim in terms of the "contributions" made by the withdrawing employers. (Joint Appendix at 388a-89a, 390a-91a; Petition at 11a-12a). As dealt with by the courts below, the level of plan assets or reserves may or may not have been at an adequate level of funding, let alone a "surplus." There was no inquiry or definition regarding any "surplus" by the courts below. The question addressed by the Court of Appeals and is presented to this Court is whether a transfer of assets is required regardless of the level of funding of the multiemployer benefit plan from which money is sought to be extracted. Accord-

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sion Fund in Support of Petitioners; Motion for Leave to File a Brief *Amicus Curiae* of the National Coordinating Committee for Multiemployer Plans in Support of Petitioners.

ingly, the question is as stated in the Petition and it has nothing to do with "surplus" assets or reserves.

2. Respondents say that the issue addressed by the Second Circuit involved the question whether plan assets must be transferred from one multiemployer benefit plan to another "when a significant number of employees" left the first plan and later became participants in a second plan. (Opp. Br. at 4). The Second Circuit's statement of the question before it contains no reference whatsoever to "a significant number of employees." (Petition at 2a). Instead, the Second Circuit's reference point is "when an employer leaves pension and welfare trust funds in favor of another set of trust funds." (*Id.*). Accordingly, the issue posed to this Court relates to one (or a few) employers withdrawing from a multiemployer benefit plan, and does not raise an issue relating to the proportion of the plan's participants involved.

3. Respondents say that the "Second Circuit's decision under the LMRA in the instant case is reconcilable with the provisions of ERISA dealing with transfers of assets and liabilities between multiemployer pension plans." (Opp. Br. at 7). The Respondents conveniently ignore Sec. 4231 of ERISA with which the Second Circuit's decision is patently irreconcilable. ERISA Sec. 4231 provides that "a plan sponsor may not cause a multiemployer plan to . . . engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such . . . transfer satisfies the requirements of subsection (b)." 29 U.S.C. Sec. 1411. That the statutory prerequisites for such a transfer have not been met is not controverted. ERISA requires that any such asset transfer be accompanied by a transfer of liabilities. Moreover, ERISA requires advance notice to the Pension Benefit Guaranty Corporation so that it can determine whether the transfer satisfies the statutory requirements. 29 U.S.C. Sec. 1411(b)(1), (c). Apparently, it is the position of the Respondents and the Second Circuit that they can bypass the scrutiny of the Pension Benefit Guaranty Corporation.

4. Respondents, in their counterstatement of facts, suggest that there was mal-administration of the Greater Funds. (Opp. Br. at 2). It is improper for the Respondents to include that material. No such findings of fact were made below. Respondents' last amended complaint did not even contain any allegations of wrongdoing. Since wrongdoing was not put in issue, the record does not contain a basis for making any fact finding on the subject.

Respondents' misleading statements are a last-minute attempt to distort the questions as having only a narrow impact on the universe of multiemployer benefit plans. The contrary is true. If the Second Circuit's view of the law were to prevail generally, not only would clear Congressional policy as expressed in ERISA be flouted but the nation's multiemployer benefit plan system would be fatally undermined.

We demonstrated in our Petition and herein that the comprehensive regulation of benefit plans by ERISA is undercut by the view of the law expounded by the Court of Appeals. That the general application of the Second Circuit's view of the law would jeopardize multiemployer benefit plans throughout the nation is demonstrated in our Petition, supported by uncontroverted expert testimony in the record and supported by the multiemployer benefit plan community as evidenced by the *amicus curiae* briefs submitted in support of the Petition by the National Coordinating Committee for Multiemployer Plans and by the Central States, Southeast and Southwest Areas Pension Fund.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petition, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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